U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 29, 1998
Case No.: 97-INA-405

In the Matter of:

CASA DI LISIO PRODUCTS, INC.
Employer,

On Behalf of:

EDGAR ROMERO
Alien.

BEFORE: Burke, Wood, and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This matter arises from a request for review by the Board of Alien Labor Certification Appeals ("BALCA" or "Board") of a denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO").[1] Employer is a food products manufacturer seeking to fill the position of "Food Technologist." (AF).[2]

In a Notice of Findings ("NOF") dated October 8, 1996 the Certifying Officer ("CO") proposed to deny the application for labor certification on the ground that, *inter alia,* Employer had failed to document that his requirements were those actually required for the job and that it was infeasible for him to train other workers. (AF 81-85). The CO found that the Alien was hired without any prior experience and had been trained by Employer. (AF 84). The CO thus requested that Employer provide documentation that it could not train anyone at this time by stating the number of Food Technologists it employed when the Alien was trained and how many were employed now, who trained the Alien, statistical evidence of an increase in the work force and volume of business, and an explanation of why an expanded company had not developed a comparable increased training capability. (AF 84).

Employer submitted timely rebuttal dated October 25, 1996. (AF 86-103). Employer

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[1]Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the implementing regulations at 20 C.F.R. Part 656.

[2]References to the appeal file are abbreviated "AF".

stated that it employed currently two Food Technologists that it had trained four years ago, both of whom were Aliens in the process of applying for labor certification. (AF 101). Employer said that its president had trained them, but had traveled over 200 days in each of the past two years and no longer had time to train new Food Technologists. (AF 101). Employer stated that its business had expanded in personnel only by the two Food Technologists (making a total of eight employees), but was now a year round business as opposed to a seasonal business. (AF 101). Employer argued that the other six employees performed unrelated functions and could not assume the training duties in the president's absence. (AF 101).

The CO issued a Final Determination ("FD") dated January 21, 1997, denying certification. (AF 104-07). The CO determined that Employer had failed to adequately document its inability to train. (AF 105-06). The CO stated that Employer failed to provide any of the requested financial data to evidence its expansion. (AF 105). The CO also stated that even though Employer's president said he had less time to train, he had provided the only training for the two Food Technologists. (AF 105). As a result of Employer's failure to rebut or cure the deficiencies the CO found in her NOF, she denied the application. (AF 105). Employer submitted a timely appeal dated February 5, 1997, and the CO forwarded it to this Board. (AF 108-110).

DISCUSSION

As interpreted in most Board decisions, section 656.21(b)(5) requires an employer to document either (a) that the requirements it specifies for a job opportunity are its actual minimum requirements, and the employer has not hired workers with less training or experience for jobs similar to the one offered, or (b) that it is not feasible to hire workers with less training or experience than that required by the job offer.

The burden of proving the infeasibility of training is a heavy one that rests with the employer. *See 58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991). An employer must sufficiently document a change in circumstances to demonstrate infeasibility. *See Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). Here, in response to a detailed request of documentation by the CO, Employer provided a letter arguing that its inability to train was based on the unavailability of the president and an increase in the volume of sales of its product. (AF 101).

The present unavailability of the person who trained the alien may be a factor to consider, but it does not guarantee a finding of infeasibility. *See Cynjoy Dress Corp.*, 90-INA-189 (July 1, 1991). Although Employer states that the president travels now over 200 days per year and that the other employees cannot assume his training duties, it does not explain how much the president was traveling in the past when he did have time to train employees. (AF 101). Because there is no evidence against which to measure the president's current travel commitment, this factor is of little probative value in this matter.

An increase in the volume of business or general growth and expansion, by itself, is also insufficient to establish infeasibility. Unless an employer proves otherwise, increased training capability is presumed to accompany growth. *See Super Seal Manufacturing Co.*, 88-INA-417

(Apr. 12, 1989) (*en banc*). Employer here did not provide any financial data to buttress its claim of increased business beyond the assertion that it was now a year round business as opposed to a seasonal one. (AF 101, 105). Employer did not attempt to explain why there was no increased training capacity, only that none existed. (AF 101). We find that Employer's evidence concerning increased sales and why no other training source existed is insufficient to carry Employer's heavy burden in this matter.

Based on the foregoing, we find that Employer has failed to sufficiently document changes in its business that would support an assertion of infeasibility to train a U.S. worker, and the CO's denial of labor certification was proper. Accordingly, the following order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.